IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2376 OF 2004

1.Carona Limited
New Udog Mandir Compound, Mogul
Lane, Mahim(W), Mumbai:400 016.

2. Anil K. Khatau
6, Manav Mandir Road,
Mumbai: 400 006. ....Petitioners

V/s.

1.Regional Provident Fund Commissioner
Employees Provident Fund Organization
341, Bhavishya Nidhi Bhavan, Bandra(E),
Mumbai:400 051.

2. Assistant Provident Fund Commissioner
and Recovery Officer Fund Organization
341, Bhavishya Nidhi Bhavan, Bandra(E),
Mumbai:400 051.

3.Board of Industrial and Financial Reconstruction
Jawahar Vyaper Bhavan 1, Tolstoy Marg,
New Delhi.

4. Appellate Authority for Industrial and
Financial Reconstruction
10th Floor, Jeevan Prakash, 25,

Kasturba Gandhi Marg,
New Delhi: 110 001.

5. Union of India
through Advocates for the
Union of India, Aykar Bhavan,
2nd Floor, Marine Line,
Mumbai : 400 020. ...Respondents

Mr.C.U. Singh, Sr. Counsel with Mr. Sanjay Udeshi with Mahesh Londhe i/b M/s. Sanjay Udeshi & Co. for Petitioners.

Mr.M.S. Karnik with Ms. P.P. Tendulkar for Respondents.

CORAM : V.M. KANADE, J.
DATED : 22nd MARCH, 2007.

ORAL JUDGMENT:-

1. Heard learned counsel appearing on behalf of the Petitioners and learned counsel appearing on behalf of the Respondents.

2. By this petition, the Petitioners are challenging show cause notice which is issued by the Respondent No.2 dated 13th July, 2004 which is annexed at Ex.K to this Petition. Said show cause notice has been issued by the Assistant Provident Fund Commissioner and Recovery Officer and is addressed to the Petitioner No.1-Company. By the said notice, the Petitioners have been asked to pay an amount of

Rs.4,07,81,721/- and the Petitioners have been asked to pay the amount within three days from the service of notice. Further, it is stated that if the said amount is not paid, the Recovery Officer would realize unpaid dues in the modes prescribed in Section 8B to 8G of the Act.

3. Brief facts which are relevant for the purpose of deciding this petition are as under:-

The Petitioner No.1 is a company incorporated under the companies Act and engaged in the business of manufacturing of leather products and is dealing in rubber, leather textile, boot, shoes and chappals etc and the Petitioner No.2 is a director of the said company. After 1991, the Petitioner No.1-Company started suffering huge losses on account of various adverse factors. Sometime in March, 1997, the accumulated losses of the Petitioner No.1-Company rose to Rs.3053.05 lakhs and which caused in total erosion in net worth of the Petitioner No.1 Company which was Rs.2493.14 lakhs.

4. As a result of financial and economical breakdown of the company, a reference was made U/s.15(1) of the Sick Industrial Companies Act, 1985 with the Respondent No.3. The reference was

registered as Case No.74 of 1998. On 18th May, 1998, the Respondent No.2 declared the Petitioner No.1-Company as a Sick Industrial Undertaking in terms of Section 3(1)(o) of the SICA, 1985 . Further, order was passed directing the Petitioner No.1-Company not to alienate its assets in terms of Section 22 A of the SICA, 1985 . Thereafter the Petitioner No.-1 Company filed proposals for rehabilitation and One Time Settlement was made and a Memorandum of Understanding was entered into with the recognized union on 30/04/2001 and also with landlord of one of the tenanted premises situated at Jogeshwari(W). The Respondent No.2 further passed an order dated 28th March, 2003 for winding up the Petitioner No.1-Company U/s.20(1) of the SICA, 1985. Against this order an appeal was preferred by the Petitioner No.1-Company and said appeal is pending before the Respondent No.3. In the meantime on 13/06/2003, the Respondent No.1 issued show cause notice why the Petitioners should not be arrested. Since post of the Chairman of Respondent No.4 was vacant, the Petitioners filed Writ Petition in the Delhi High Court and permission was granted by the Delhi High Court to the Petitioners to surrender the tenancy rights and directed that the amount received by the Petitioner No.1-Company be deposited

with the Bank of India in "No Lien Account".

5. In the meantime, thereafter the Respondent No.1 again issued show cause notice and it was stated therein that if the payment was not made, the Revenue Recovery Certificate would be executed by arrest and imprisonment by the Respondent No.2. Being aggrieved by the show cause notice the Petitioners filed this writ petition.

6. It is submitted by the learned counsel for the Petitioners that finally appeal was allowed and order dated 28th March, 2003 passed by BIFR recommending winding up of company was set aside and matter was remanded back to BIFR. In the meantime, since the Appellate Bench of BIFR was not available, certain applications were made by the company before Delhi High Court and Delhi High Court granted leave to the company to sell one of its assets and deposit sale proceeds to the tune of Rs.1.62 crores in the Delhi High Court. Respondent issued notice dated 13th June, 2003 U/s.8(B) of the said Act which was show cause notice issued to one of the Petitioners demanding certain amount as stated in the notice and if amount is not paid, the Petitioner would be arrested. A reply stating various facts as enumerated herein above

which was given by the Company was accepted. However, subsequently, notice dated 13/7/2004 was issued.

7. Learned counsel for the Petitioners submitted that the said notice which was issued is patently illegal since show cause notice does not state what was the default committed by the Petitioners as envisaged under Schedule 3 of Income Tax Act and Rules 73 of Income Tax Rules and therefore, said notice is liable to be quashed and set aside. He invited my attention to the provisions of Section 8 of the said Act which lays down procedure of mode of recovery of moneys due from employers and Section 8B which lays down procedure of certificate being issued to Recovery Officer. He also invited my attention to the provisions of Section 8G which makes certain provisions of Income-tax Act namely provisions of the Second and Third Schedule of Income Tax Act 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 which are made applicable and are incorporated under Section 8 of the said Act. He submitted that by virtue of incorporation of provisions in Income-tax Act, procedure which is laid down under the said schedule and Rules of Income Tax Act have to be followed as condition precedent before show cause notice of arrest can be issued. In support of his submissions, he

has placed reliance on the judgment of this court in the case of **Kanaiyalal Prabhudas Maru and Others V/s. Regional Provident Fund Commissioner, Maharashtra & Goa and Others reported in 2002-I-LLJ page No.297.** He submitted that this court has construed said provisions of Section 8B and 8G of the said Act and has held that provisions of Income-tax Act and Rules have to be applied and on failure by Recovery Officer in complying with the said Act and Rules, show cause notice issued was liable to be set aside. Learned counsel Mr.C.U. Singh specifically submitted that at this stage he did not wish to challenge the quantum of demand which was made but other issue which was in challenge was the show cause notice of arrest of the Petitioner U/s.8B of the said Act.

8. Learned counsel appearing of the Respondents invited my attention to the Judgment of this Court in the case of **Ralliwolf Limited V/s. The Regional Provident Fund Commissioner-I for Maharashtra & Goa & Ors. Reported in 2001 I CLR 85** wherein this Court has held that provisions of Section 22(1) of the SICA, 1985 would not help to the Petitioners in view of nature of payments which are required to be made by way of provident fund and other contributions under E.P.F. Act, 1952

and therefore, recovery of provident fund and other dues under E.P.F. Act, 1952 did not fall within the scope and purview of Section 22(1) of the SICA, 1985. He further submitted that on perusal of the impugned notice, it did appear that procedure which is required to be followed under Second and Third Schedule of Income Tax Act and Rules 73 was not followed and that there is no material to indicate that these mandatory provisions were followed before notice was issued.

9. In my view, ratio of the Judgment in the case of **Kanaiyalal Prabhudas Maru and Others (supra)** squarely applies to the facts of this case. Learned Single Judge of this Court in the said case has observed in para 17 as under:-

> "The warrant of arrest is in the present case vitiated due to the failure of the competent authority under the Act to record its satisfaction, with reasons in writing, that would demonstrate, that the conditions which are specified in Clauses (a) or (b) of sub-rule(1) of Rule 73 of the Rules contained in Schedule II to the Income Tax Act, 1961 have been satisfied. The File Note of June 25, 2001, (Exh.9 to the reply) shows that the Second and the Third Petitioners stated before the authority that all their properties had already been encumbered and that it was impossible for

them to furnish any security at present. Before me also, it has been stated on behalf of the Petitioners by the learned counsel that both, the residential flat at Bhulabhai Desai Road, Mumbai as well as the factory premises have been encumbered with the Central Bank of India and it is, therefore, not possible for the Petitioners to even sell the aforesaid properties. The file note dated June 25, 2001 in fact reflects that the authority was of the view that it was not possible to explore the availability of unencumbered property for attachment or sale or to appoint a Receiver for the Management of the property of the establishment since the establishment was already closed. The R.P.F.C., therefore, concluded that it appeared to him that the only way to compel the notices to pay the P.F. dues is to arrest and detain in the civil prison. In deciding to exercise the power of arrest for the aforesaid purpose, the authority had over-stepped its jurisdiction under Section 8-B read with the provisions of Section 8-G and Rule 73 of the rules contained in Schedule of the Income Tax Act, 1961. The authority has not arrived at the satisfaction, statutorily mandated as a condition precedent for effecting arrest, that the defaulter had either dishonestly transferred, concealed or removed any part of his property or, that despite being possessed of the means to pay the arrears had refused and neglected to do so. The recording of reasons which constituted the basis of the satisfaction of the authority is a condition precedent to

> the exercise of the power of arrest. The absence of those reasons vitiates the exercise of the power of arrest and that lacuna cannot be rectified by pointing out circumstances in justification in the affidavit before this Court. The arrest has, therefore, been carried out in a patently arbitrary manner and in violation of the personal liberty of the subject under Article 21 of the Constitution. In the circumstances the Petitioner is entitled to succeed and the *ad interim* order dated July 3, 2001 is accordingly, liable to be confirmed."

10. In the present case, admittedly, no grounds have been mentioned in the show cause notice to justify the issuance of warrant of arrest. I am fortified, in my view, for arriving at the said conclusion in view of the views expressed by the learned Single Judge of this Court in the case of **Kanaiyalal Prabhudas Maru and Others (supra)**. Impugned order therefore is liable to be quashed and set aside. Writ Petition is allowed in terms of prayer clause(a) & (b). Rule is made absolute in the above terms.

11. Since the petition is disposed of, nothing survives in the Notice of Motion No.674 of 2006 and same is disposed of.

12. It is made clear that the Respondents may if so advised issue

fresh notice after complying with the relevant provisions.

V.M. KANADE, J.